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[*Murphy v. Consolidation Coal Co.*](#), 83-ERA-4 (ALJ Aug. 2, 1983)

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U.S. Department of Labor
Office of Administrative Law Judges
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Case No. 83-ERA-4

In the Matter of

THOMAS F. MURPHY
Complainant

v.

CONSOLIDATION COAL COMPANY
Respondent

Robert P. Ging, Jr., Esq.
For the Complainant

Daniel L. Stickler, Esq.
For the Respondent

Before: GEORGE P. MORIN
Administrative Law Judge

DECISION AND ORDER

This Proceeding was commenced with the filing, on

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December 11 1982, of a complaint by Thomas F. Murphy against his then-former employer, Consolidation Coal Company (hereinafter at times referred to as Consol, Consolidations Coal, or the employer), under the Employee Protection Provisions (at

times called Whistle-Blower" Provisions) of several statutes in the area of environmental protection, specifically, The Clean Air Act Amendments of 1977, 42 U.S.C. § 7401, *et seq.*; the Clean Water Act, 33 U.S.C. § 1252, *et seq.*; The Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.*, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* (hereinafter cited as "Superfund"); and Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* (hereinafter cited as "RCRA"). On December 15, 1982, Murphy amended his complaint by adding an additional Act with Whistleblower protection provisions: the Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.*

By letter-notice dated December 27, 1982, addressed to Consol, the Area Director of the Wage and Hour Division, U. S. Department of Labor, found, after investigation, that Murphy had performed his duties with Consol in accordance with the employer's announced policy of "Total dedication to the concept that its operations will be conducted in compliance with all applicable laws and regulations, without exception," and that his strict adherence to that policy had caused friction with production personnel and had made him unpopular. The Area Director, *sub silencio*, made the finding that the Employee Protection Provisions had been violated, as the employer was ordered to abate the violation and provide appropriate relief which would:

Reinstate Thomas F. Murphy to his former position together with compensation (including back pay for any time for which he was not compensated), terms, conditions, and privileges of employment, and costs, including attorney's fees in filing this complaint.

The employer availed itself of the appeal provisions offered to it by the regulations governing the handling of discrimination complaints under Federal Employee Protection Statutes, found at Title 29, Part 24 of the Code of Federal Regulations, by sending a telegram to the Chief Administrative Law Judge, within five calendar days following receipt of the Area Director's order, requesting a hearing.

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Thereafter, the matter was the subject of two separate hearing sessions before this Administrative Law Judge, comprising a total of three days. Post-hearing briefs were filed by the parties on July 5, 1983¹, on which date the record closed.

1. *General Factual Background*

What follows at this point in this Decision and Order is a statement of facts which are not in dispute. At the conclusion of this portion of my decision, I shall clearly indicate when I am making findings in disputed factual areas.

Consolidation Coal Company is a very large producer and processor of coal, with 52 coal mining operations in nine States and the Province of Alberta, Canada. For

administration, operations, and, insofar as this proceeding is concerned, for environmental quality control purposes, the territory is divided up into five Regions with central control at Consol Plaza, in Pittsburgh, Pennsylvania. At all times here relevant, the Environmental Quality Control Department (EQC) has been under the direction of Buddy A. Beach whose title, since March of 1980, has been Vice President for Environmental Affairs.

In order to more closely monitor compliance with State and Federal laws and regulations affecting Consol's operations, to formulate an instruction manual on NPDES², and to conduct a training course for environmental quality compliance, Beach, with the approval and encouragement of top corporate management at Consol, including Chief Counsel Peter Wellington; Consol's President, B. R. Brown; and Consol's Chairman and Chief Executive Officer, R. E. Samples, as well as officials in the corporate environmental department of Consol's parent company, CONOCO,³ early in 1980 embarked upon establishing a program which was to have the title, descriptive of its function, of The Environmental Quality Assurance Program. Beach knew he was heading in the right direction from the contents of a memorandum, dated March 25, 1980, from Chairman Samples to all salaried employees of Consol on the subject of compliance with law, in which Samples introduced, in principle, the Environmental Quality Assurance Program to the staff. In the memorandum he stated:

There can be no misunderstanding as to the Company's

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total dedication to the concept that its operations will be conducted in compliance with all applicable laws and regulations, without exception. It is in the best interest of both the company and its employees to act solely within the boundaries of the law. To do otherwise invites public criticism, investigation and possible exposure to felony and misdemeanor prosecutions. (Complainant's Exhibit No. 3)

The Consol program, as set up by Beach, has four major objectives: First, to assure that all of Consol's operations are following corporate environmental policy; second, to reduce the number of environmental quality citations; third, to avoid temporary suspensions and permanent closures of Consol operations through regulatory agency orders; and fourth, to provide protection for Consol management from civil and criminal actions by the government for improper responses to environmental quality laws and regulations. Ranking the importance of the goals of the program, Beach, in a May 1980 speech, stated that achieving the fourth listed goal was to be the main objective of Consol's Environmental Quality Assurance Program.

Beach was authorized, during the spring of 1980, to fill three new positions in the Pittsburgh Corporate EQC office in order to carry out the functions of the Environmental Quality Assurance Program: a quality assurance manager, a quality assurance specialist, and a secretary. The first named position was filled in May 1980 when David P. Larson was transferred and promoted from his job as Environmental Coordinator in Farmington, New Mexico, where he had worked since joining Consol in 1978. Larson's educational

background included a Bachelor of Science degree in biology from the University of Colorado, a Master of Science degree in planned ecology from that same institution, and a second Masters degree, this one in mathematics, from the University of South Carolina. His first job after graduation was with a firm which did consulting work in the environmental field. In New Mexico, Larson's job was in the field of obtaining permits for new coal mines (permitting). When he joined it, the Environmental Quality Assurance Program had been in the conception and planning stages for approximately five months. Larson's first and certainly most important assignment after coming aboard was to work with Beach on setting up the mine and facilities inspection portion of the program. This inspection and auditing program was undertaken by Consol as a strictly

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voluntary effort, not one mandated by any State or Federal law or regulation, to insure that field operations were being conducted in compliance with all applicable laws and regulations, especially the five major Federal Environmental Acts, and to point out to field personnel items of possible or apparent non-compliance.

Larson and one other person were to conduct the field inspections and audits, with Larson to have supervisory responsibility over the second inspector. Both would report to Beach whose immediate superior in the corporate chain of command was the Senior Vice President for Engineering, Exploration and Environmental Affairs. In mid-1980, G. L. Barthauer occupied that position at Consol. He reported directly to R. E. Samples, Consol's Chairman and C.E.O. The inspection and audit program was to be conducted in three stages, or rounds, with somewhat different procedures to be followed for each.

In round one (targeted to begin around July 1, 1980, but in fact not initiated until October of that year), one of Consol's 52 operating mines would be selected at random and preliminary paper work, such as reviewing files, collecting data on the to-be-inspected facility, and monitoring reports on file⁴ from that operation, would be done. Following this, a physical inspection of the facility would be carried out by one of the inspectors, accompanied by one or more persons from the facility⁵. Presumably, areas of apparent non-compliance would be discussed between the inspector and those representing the inspected facility. Upon return to corporate headquarters, the inspector would prepare a detailed written report on all items of non-compliance or apparent non-compliance, after first discussing over the telephone with the personnel at the inspected facility what would be going into the report. The facility was required to file a written response to the inspector's report. Larson and Beach also worked on procedures to be followed in the contemplated second and third rounds, but before describing these in detail it would be opportune, at this point, to introduce and discuss the background of the third professional on the team - Thomas F. Murphy.

Immediately prior to joining the Environmental Quality Assurance Program in October 1980, Murphy had held the position

of Coordinator, Environmental Reports, into which he was hired when he joined Consol in October 1978. His supervisor in that job had been Buddy A. Beach whose title at that time had been Director, Environmental Permit Activities Section. Also under Beach's jurisdiction was the permit section, but Murphy's job was in the reports section where he gathered information to be turned over to consulting firms doing environmental studies for Consol.

Murphy received his B.S. degree in biology, with a minor in chemistry, from Northern Illinois University in January 1972. His first job upon graduation in the environmental field was with Air Resources, Incorporated, as an environmental scientist. He held that position in which his main job was the preparation of environmental impact studies, from June of 1973 until he was laid off in June of 1975. He was out of work until October 1975 when he was hired by The Milwaukee Railroad as Assistant Environmental Engineer. For the following three years, until the Milwaukee's bankruptcy eliminated the need for his services, Murphy prepared environmental impact studies to be used in trackage abandonment proceedings before the Interstate Commerce Commission and in various other proceedings before that regulatory agency and the Federal Railroad Administration. He was also responsible for overall compliance with departmental regulations in general and, in particular, with the Clear Water Act (the discharge of pollutants). Complainant's Exhibit No. 26 consists of extracts from Murphy's personnel file containing letters and memoranda favorable to Murphy's performance while with the Milwaukee, including a special commendation for Murphy and another individual who prepared a particular environmental impact statement at a cost to the railroad of approximately \$5,000 to \$7,000, whereas the same document, prepared by a consulting firm, would have cost between \$50,000 and \$60,000.

Responding to an advertisement seen in *Ad Search Journal*, Murphy applied for an opening with Consol. Consol paid Murphy's air fare from Chicago to Pittsburgh and, after an interview with Peter Briggs, Manager, Environmental Reports, lasting several hours, and about a half hour interview with Beach, Murphy was offered the job of Coordinator, Environmental Reports.

2. Murphy's Performance as an Employee

As previously indicated, pertinent undisputed facts have been set out in the preceding section of this decision. In the

sections to follow my findings will be based upon my evaluation of the evidence both where facts are in dispute and where there are no substantial disputes as to facts between the parties. My findings will be based on documentary evidence and the oral testimony of

witnesses with my determinations made as to the credibility of witnesses based upon my perception of their manner and demeanor in testifying.

There were two incidents which occurred while Murphy was in the Environmental Permit Activities section which respondent contends reflect on Murphy's "attitude" and his ability to get along with his fellow employees. In that job, Murphy reported to J. G. Gleich who, in turn, reported to Beach. However, in January 1979, Briggs, who had hired Murphy and was his immediate superior, quit his job and for a while Murphy was reporting directly to and taking directions for performing his job from Beach. Murphy asked Beach if he should send washed coal data along with raw coal data to D'Appolonia Consultants, who were doing base line studies on two separate projects for Consol. When Beach told him yes, go ahead, Murphy mailed the data out to the consultants. Murphy informed H. D. Dahl who was Director of Underground Mining Engineering at the time. Dahl became upset upon learning of this because washed coal data is proprietary information which should not go to anyone outside the company. Murphy went out in a blizzard and retrieved the data from the mails before it reached the consultants. Although respondent seems to consider this a black mark on Murphy's record and an early indication of the attitude said to form the basis for his discharge, Beach, while not admitting that he gave Murphy the go-ahead to send the washed coal data to D'Appolonia, effectively neutralizes the incident with the statement:

I'm certainly not alleging that it was a deliberate attempt on Mr. Murphy's part to give confidential data to a third party, *I think it was a mistake, if that.* (Tr. 344-345, Emphasis added.)

Again, while Murphy was still in the reports section, Beach received another complaint from Dahl concerning Murphy's manner in requesting information from the Engineering Department, specifically, maps, plans and other data needed to obtain permits and approvals for new mine projects. As related by Beach, who appeared to be telling the truth, instead of trying to cultivate an atmosphere of harmony and cooperation with the personnel in

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the Engineering Department, Murphy's demanding attitude tended to antagonize those very people whose good-will he should have been cultivating by calling for data which they considered exceeded his need for the particular project he was working on, and by insisting that it be done on his timetable rather than theirs. At some point, Dahl came over to Beach's office and speaking of Murphy said: "Keep that guy out of my hair; I don't want to see him in my shop any more with any of my people." (Tr. 269.) But, Beach added, problems dealing with Dahl and people in the Engineering Group were not unique to Murphy (Tr. 359).

Beach was sufficiently sensitive to the position Dahl occupied and the effect he could have on Beach's promotional opportunities to want to remove the source of irritation to

Dahl.⁶ The opportunity for doing this presented itself when the opening occurred in the Environmental Quality Assurance Program, although this explanation for relocating Murphy is somewhat blurred by the fact that the job was first offered to Nicholas P. Neumann who, at the time, was Manager of Environmental Quality control for the Ohio operation in the Midwestern Region, and who turned down the job upon learning what it involved. One may wonder if events had taken a different turn and Neumann had accepted the job offered him in the Environmental Quality Assurance Program whether Murphy would ever have been terminated.

Although the question was not asked at the hearing. Murphy apparently went over to the Environmental Quality Assurance Program in June of 1980 (see Complainant's Exhibit No. 5) but he did not receive his promotion until October. It would appear that Murphy had little training for the job at Consol Plaza before the inspections and audits began in October 1980. For the first three inspections carried out during the first round, Larson accompanied Murphy to insure that the guidelines he and Beach drew up were being followed.

Only the second facility inspected during the program's initial phase was the Turkey Gap Mine at Pocahontas, Virginia. This inspection took place in October 1980 and Larson prepared the report. The response was prepared by Claude Morgan and is sharply critical of Larson's report, in particular of inclusion therein of items which Morgan thought had been satisfactorily explained in oral discussions during the course of the inspection. Morgan complained that Larson did not even

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acknowledge that the field personnel were aware of items of concern or that many solutions were planned or underway. At least 16 of the 28 items in the report had been discussed and explained during the inspection.

In later inspections which he carried out, Larson cited significantly fewer items which should be considered for attention or items which were identified as areas of possible non-compliance with the environmental regulations. In fact, Larson would only include in his reports the two or three most significant apparent non-compliance items observed whereas Murphy, a much more exacting inspector and auditor, would include virtually every item of apparent non-compliance or which should be considered for attention. This practice of Murphy's, as testified to by both Beach and Larson, produced many telephone calls from the field complaining in just the manner that Morgan did about Larson: Murphy would not listen to explanations as to why an item had not been corrected which might include such factors as a State or Federal inspector having just observed the same item and had not considered it a violation; the item had already been recognized as one of non-compliance and a plan for its correction had been agreed upon or even that funds had been allocated for the correction; Murphy would ask the same question several times throughout an inspection; and Murphy made the people at the operation feel like criminals, that they were involved in some vast conspiracy to violate the environmental

laws. In more general terms, Murphy was said to have an abrasive manner about him which set field personnel against him, and seemed to have spilled over into criticism of the program as a whole as well as Murphy's manner of carrying out his part in the program.

The first round of inspections with Murphy and Larson each inspecting one facility a week took about six months to complete although, according to Beach, it was closer to a year before the second round of inspections got underway. Procedures for the second round were outlined by Larson in his memorandum to Beach on the subject, dated June 11, 1981. (Complainant's Exhibit No. 4.) As in the first round, a facility was to be selected at random and the mine superintendent and regional management were to be given ten days advanced notice of their property being inspected. The inspection itself was to be conducted in a manner substantially similar to that employed in the first round. In this memorandum, it should be pointed out, appears a sentence

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which was repeated over and over in various contexts by Attorney Ging at the hearing. This reads as follows:

"... We [the inspectors] will not consider the degree of enforcement by the regulatory authorities nor recognize uniquely flexible interpretations.

Representing changes from first-round procedures, only an oral discussion of the inspector's observations and findings in lieu of a written report was to be had. The facility⁷ would then be reinspected 45 days later, following the same procedures as in the initial visit. Then would follow the written report which, presumably, would not include items which were noted and discussed at the initial inspection and had been corrected in the interim. Circulation of the written report was to be to the mine superintendent, Beach, the Senior Vice President of Mining in the Region, the Supervisor of Environmental Quality Control in the Region, and the Corporate Legal Department. Thereafter, a response would be filed from the operation stating exceptions to specific findings; giving status of corrective actions that have been taken; and providing a schedule for additional corrective actions to be taken. Finally, a quarterly state of compliance report, summarizing outstanding noncompliance items by operation, was to be prepared, with the first one to be submitted in December 1981, and copies going to B. R. Brown and R. E. Samples.

Apparently the first and second rounds progressed in a satisfactory manner since, in December 1981, Beach, in an address given at the DuPont/CONOCO/Consol Environmental Quality, Safety and Health Meeting, held on December 17 and 18, 1981, expressed the belief that:

"... The Environmental Quality Assurance Section has done an outstanding job in carrying out its responsibilities to date. In general, compliance has been found

to be good given the confusion that exists with overlapping and vague regulations and inconsistent enforcement. While there is no way to determine the precise cause, the total number of environmental violations at Consol's mines is less in 1981 than it was in 1980." (Complainant's Exhibit No. 5.)

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During the first and second rounds, Murphy perceived his job to be to report all unsatisfied violations of the Federal enforcement statutes which the program mandated should be inspected under. There were no exclusions, no violations of a certain type or magnitude which were not to be cited. He saw his responsibility as inspecting, noting and reporting on every violation that he observed.

In addition to the friction and antagonism caused at the operations by Murphy's strict adherence to his perceived mandate regarding the scope of the area of inquiry and reporting at the time of the inspections, some of the operations objected to his inclusion in his written reports of *de minimus* items, of items they knew about already and had advised him of that fact at the time of his inspection, and of items which Federal or State inspectors had noted but not considered so serious as to warrant the issuance of a Notice of Violation. Such reports provoked caustic comments concerning Murphy and his inspecting and reporting techniques. However, it is an undisputed fact that either Larson or Beach, or both, reviewed and edited, for both style and substance, every report that went out in Murphy's name. There are examples in the record of heavily edited draft reports (see, for example, the report of the inspection of the Hillsboro Mine and Preparation Plant of July 1, 1982, (Complainant's Exhibit No. 18) which, in final form, appeared to the recipient at the operation to be the work of Murphy alone. Murphy testified, and there was no contradiction by either Larson or Beach, that when a report with changes was handed back to Murphy for his signature, he was not permitted to make any further changes. on one occasion he refused to sign a report which said no violations of a certain type had been seen, when in fact such violations were observed. Beach or Larson backed down on this; the item was removed; and Murphy signed the report. When asked why, with his power to edit and change both style and content to make the report more palatable to the recipient, he did not do so, Beach's rather weak and ineffectual response was that, since Murphy had been the actual person to observe the situation, his observations should be the ones to go out.

Murphy introduced into evidence a number of documents from his files, most of which were reports sent to operations following his inspections each of which was entitled: Environmental Quality Assurance Inspection Report. Each bore a

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cover letter, signed by Murphy, requesting a response by the addressee within 30 days "addressing each item in the . . . report and [providing] a schedule for correcting the condition or an explanation as to why no action is necessary." The reason these

documents re in evidence is to document a report having been made by Murphy of one or more violations or apparent items of non-compliance under each of the Acts under which his suit was filed, except that there is no documentation of any items reported as violations of the Clean Water Act. An item-by-item analysis would add unduly to the length of this decision. A few general observations should suffice except for two or three which provoked more than the usual response and may have made significant contributions to the company's perceived case for firing Murphy.

Most of the reports are either headed "draft" or bear evidence in the form of cross-outs and marginal notes, presumably by Beach or Larson, which would indicate that these exhibits are not the finished product.

These documents, while reporting actual or perceived violations of the Federal environmental acts, are no more nor less than Murphy's work product, turned out while he was an inspector in the Environmental Quality Assurance Program. This is what he was hired to do and the violations reported are precisely the matters which he should have been calling to his employer's attention so that corrective action could be taken.

These reports, *per se*, do not appear to confer whistle blower protection upon Murphy. In most instances, Murphy readily admitted, usually in response to questions by his own counsel, that he missing permit or a waiver excusing its absence had been obtained; that the violation had, in some way, been satisfactorily abated; that the required report to the proper regulatory agency had been sent; or that the company was still undecided what action it should take considering the gravity of the situation or the expense involved in doing the work.

3. Matters of a More Serious Nature Which May Have Contributed to Murphy's Dismissal

a. The PCB dumping incident at Jordan Mine #93

PCB stands for polychlorinated bifemals. They are

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dielectrics (non-conductors) used in capacitors, transformers and mine load centers. They are listed as toxic substances under the Toxic Substance Control Act. In May 1982, Murphy, in the company of Charlie Krushanski, a PCB expert, was inspecting Consol Mine #9 in the Northern West Virginia Region, when they were approached by Brent Hughes, a security guard either directly employed by Consol or else in the employ of a construction company which was doing work for Consol, but more likely the former. Hughes recounted to Murphy and Krushanski a story of observing the draining onto a railroad embankment of a liquid material from equipment with PCB labels on it at the Jordan Mine #93 which was being dismantled at the time. If true, this would have been an incident reportable to the U. S. Environmental Protection Agency. When told of this,

Beach immediately convened a meeting attended by Larson and P. S. Wellington, Chief Counsel of the Corporation. Both Murphy and Krushanski were interviewed separately and both told the same story. Murphy learned that Hughes had been fired. Later Larson told Murphy that Hughes had been rehired after, according to Complainant's Exhibit No. 17, having told an entirely different story to S. P. Skeen who investigated the incident and reported back to Wellington. Hughes told Skeen he had not observed any liquid being dumped and that the equipment he saw was not the type that would contain PCB (motor control cabinets rather than transformers). Skeen concluded his memo with the statement that the matter could have been cleared up if Hughes had been asked a few questions (by Murphy) during his initial report of the incident. At the hearing, Murphy could only say that Hughes told him and Krushanski a different story than he told Skeen, and that Beach had believed Murphy and Krushanski.

b. Murphy's Remark Made at Turkey Gap Mine

About a week after the incident reported above occurred in Northern West Virginia, Murphy had occasion to inspect the Turkey Gap Mine in the Southern Appalachian Region, in the company of the Regional Supervisor, Environmental Quality Control. Murphy observed an obvious PCB stain on the ground in the area where a large transformer had been vandalized for its copper. Murphy made this his first inspection item and remarked on the similarity to the Jordan Mine #93 incident. In the course of the conversation, which included rumors of layoffs by DuPont in the CONOCO and Consol environmental departments, Murphy made an off-hand remark that they couldn't fire Dave Larson or him

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because they knew too much, but immediately followed the remark by saying he was only kidding. The Regional Supervisor failed to see the humor, as he immediately reported the remark to Beach who confronted Murphy with it when he returned to Pittsburgh. Although Beach told Murphy he might receive a censure from Skeen, who was Senior Vice President for Engineering at the time, for making the remark, one was never received.

C. Irregularities in PCB Handling at Hillsboro Mine and Preparation Plant

In a report covering an inspection of Hillsboro Mine and Preparation Plant which took place in July 1982, Murphy listed as an area of possible non-compliance with environmental regulations an apparent non-compliance with the Toxic Substances Control Act: failure to satisfy labeling, recordkeeping, storage, and disposal requirements of the PCB regulations for approximately 50 PCB in-service, spare, and scrap PCB capacitors discovered at the mine. This facility is located in the Northwestern Region (Ohio and Illinois) where Frederick W. Paddock, Jr. is Regional Manager for Environmental Affairs. At the time, he was the boss of Richard Denning, Supervisor of Environmental Affairs for Ohio and Illinois, who accompanied Murphy on this

inspection. From his inspection of the records at the operation, Murphy determined that the region was out of date by from one to two years with their compliance on inventories of spare PCB-containing transformers and capacitors. At Hillsboro, Murphy had been told that the capacitors had been inventoried and that none existed at the time. Murphy's suspicions were aroused as, in his experience, every deep mine had PCB-containing transformers, capacitors and power centers. An electrical foreman at the mine conceded that there could be some PCB containing capacitors at the mine. In the supply yard, Murphy and Denning found four scrap or spare power centers containing PCBs and four PCB-containing capacitors. While Murphy was on leave for several weeks, Denning completed the inventory. On his return (to Pittsburgh) from his leave, Murphy read a copy of a memo from Denning to Paddock informing him that 50 large pieces of capacitors had been found at the mine, contrary to what the environmental staff had said about there being *no* PCB-containing capacitors in the area. At the time of the hearing, Denning testified that he was then employed as Coal Lab Supervisor for the Illinois operation in Pinkneyville, Illinois, having been transferred there on August 1, 1962, from his former position in

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Evansville, Indiana. Denning's explanation for why he was transferred has nothing to do with his cooperation with Murphy in uncovering the PCB handling and disposing irregularities in the Northwestern Region; rather it was because his job with Regional EQC in Evansville was abolished and he had been expecting a transfer in anticipation thereof. The other principal in the incident, Frederick W. Paddock, Jr., testified that it was he who got Denning transferred to the coal lab in Illinois because Denning's position in Evansville was being eliminated and Paddock wanted to do something to "keep a valuable employee on the payroll" (Tr. 441). The evidence that Denning was being punished for cooperating with Murphy is circumstantial, but given the circumstances in which the Environmental Quality Assurance Program was born (a reaction to the record falsification scandal in the Southern Appalachian Region and, to a lesser extent, in the Midwestern Region) and R. E. Samples's total commitment to strict adherence to all environmental laws and regulations, and the fact that F. W. Paddock could be in serious trouble as head of Regional E.Q.C. if the Hillsboro PCB coverup should reach the ears of the Chairman and Chief Executive Officer, R. E. Samples, Paddock's explanation for Denning's abrupt transfer lacks credibility.

d. Disposing of Two or Three Barrels Per Month of Solvents Containing Superfund Reportable Materials in Reportable Quantities at Pocahontas Central Shop

Murphy learned, sometime in early 1982, through a conversation with Larry Farley, Superintendent of the Pocahontas Central Shop in the Southern Appalachian Region, that two to three barrels of a spent solvent (Varsol) were being disposed of in a landfill behind the shop. Murphy was immediately alerted to the fact that this represented violations of both Superfund and RCRA provisions as well as Virginia environmental protection laws and regulations. He reported the conversation to Larson and Beach but they counseled

him to wait until he inspected the facility, which was to occur several months hence, before taking action in the matter. Murphy ascertained the facts when he did inspect the facility but the regional environmental personnel dissuaded him from citing the landfill disposal as a Superfund and/or RCRA violation for fear of the far-reaching and expensive consequences it would have upon the company. Instead, Murphy reported it as a situation which required a permit under the

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Virginia Solid Hazardous Waste regulations. Even so, the matter was so serious that the response to Murphy's report was hand delivered by Claude Morgan who came all the way from his office in the Southern Appalachian Region at Bluefield, West Virginia. Morgan was upset that Corporate EQC had not advised him (Morgan) even of the existence of the regulations. The response, which was late coming, was delivered September 20, 1982.

c. Vincent Ream's Remark Concerning Murphy's Inspections in the Northern West Virginia Region

Vince Ream is now retired but when employed worked in operations in Consol's Northern West Virginia Region. He had a low regard for corporate environmental personnel. After an inspection by Murphy of a facility in Ream's region when Ream and other field personnel were along, and Ream objected to the way Murphy was questioning them and behaving generally, Ream called Larson and, referring to Murphy, stated that he didn't want that S.O.B. down there any more. Other oral complaints about Murphy's behavior on inspections were received from Ed Sutter, Environmental Supervisor of the Eastern Region, and from Vic Ordija and Irving Anderson of the Midwestern Region.

f. Neumann's Criticisms of Murphy

Prior to his present job as Group Leader for Preparation and Quality Control, Nicholas P. Neumann (briefly mentioned above), worked as Manager of Environmental Quality Control for the Ohio operation where he reported to Frederick W. Paddock, Jr. In his environmental job Neumann had 11 operations within his jurisdiction, consequently, he had numerous opportunities to accompany Murphy on his inspection trips and to read Murphy's reports of those inspections. Among Neumann's criticisms of Murphy are that he wouldn't listen when Neumann and others in the inspection party tried to give their interpretation of the law or inform Murphy that matters he considered as non-compliance items had been interpreted by Federal and State agency inspectors as being in compliance. Neumann and his operations would present their position on a particular inspection item up to three times, and still Murphy would not accept it as credible. Neumann and his people were in agreement that they had a "personality problem" with Murphy. Only early on in the program were similar problems encountered with Larson. Succinctly stated, Neumann's complaints with Murphy were his attitude, his comments and the

redundancy of his questions.

In order to particularize Neumann's disagreements with Murphy and his dissatisfaction with the latter's conduct of his inspection and his methods of reporting them, Consol introduced Respondent's Exhibit Nos. 2, 3 and 4 which are copies of responses to three inspections conducted by Murphy in 1980 and 1981 at facilities in the Ohio operation. Each is signed by a person having some connection with the inspected facility, but in fact all three were drafted by Neumann. Before discussing these memos and their contents in somewhat more detail, it should be noted that Neumann is well qualified for his job by virtue of educational and occupational background, with both bachelor's and master's degrees in geological engineering, with course content emphasis on coal and environmental subjects. He considers himself to be at least as qualified for Murphy's job as Murphy is, and better qualified with respect to anything having to do with the Ohio operations of Consol.

Respondent's Exhibit No. 2 is a response, signed by Ted Kovalski, to a report of inspection of the Franklin Highwall Mine No. 65. One of the items in Murphy's report, No. 4, was:

Regular maintenance of the Route 9 Portal sewage system treatment plant (weeds in sand filter and sand filter wall collapsed) and adjustment of sampling schedule to insure that monthly samples are obtained.

The response to this one sentence covers one and one-half pages of single-spaced typing. The crux of the response is that the sand filter was constructed as a double chamber and, while the left side was collapsed and overgrown with weeds as pointed out by Murphy, the right side was regularly inspected and maintained and was in good repair, all of which was explained to Murphy in the course of the inspection. The remainder of the response defends as adequate the sampling schedule under which the treatment plant is monitored.

In an item-by-item discussion of the three responses conducted in cross-examination by Attorney Ging, Neumann agreed that in most instances items pointed out as being in apparent non-compliance were properly reported. When these caustic responses were prepared, Neumann states that he was unaware as to

what Beach's instructions were to Murphy concerning items which should be reported, or that Murphy was "not to consider the degree of enforcement by regulatory authorities, nor to recognize uniquely flexible interpretations with respect to his inspections." (Tr. 488). If Neumann had been aware of Murphy's inspection parameters, there probably would not have been the degree of controversy over such items as the use of instream

sediment ponds, acceptable under local (Ohio) laws and regulations but still in violation of the Clean Water Act.

4. Circumstances Surrounding Murphy's Termination

Although Beach recognized in Murphy an employee with excellent knowledge of environmental laws and regulations, one thorough in his job and a hard and intelligent worker, he nevertheless, on the afternoon of September 24, 1982, reached the decision to terminate Thomas F. Murphy's employment with Consolidation Coal Company. As explained in great detail both on direct and cross-examination, a number of factors entered into this decision. These will be discussed in the depth that I feel necessary, mindful of the fact that this relates to one of the crucial issues in this case.

a. Murphy's Rating in the Annual Performance Review and the Pay Raises He Received During the Course of His Employment

Each April, a corporate decision is made at Consol of the percentage of increase which will be allocated to salaried personnel beginning in October of the same year. This percentage is arrived at considering such factors as the rate of inflation and the corporate performance in the preceding year. According to Beach, and presumably this is the way all department heads operate, he totals up the salaries of all his salaried people and multiplies that by the announced company percentage which gives him a dollar amount he can distribute, based on his own meriting system, among the salaried people. Murphy testified that he received four merit pay raises while he was with the Environmental Quality Control Group, plus a cost of living increase which everyone received. In 1979, Murphy received a 10.8% salary increase; in 1980, when he transferred from the reports section to the Environmental Quality Assurance Program, one of 16%; in 1981, 11.1%, and in 1982, 9.6%. Respondent's Exhibit No. 1 gives the name and percentage increase in the salary of each person in Murphy's department for the salary

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years 1980-81, 1981-82, and 1982-83. In the first year covered, Murphy was to receive a 7.6 percent increase, but this never took effect because that was the year that he received the 16% promotion increase. Had he received it, his increase would have been the fifth lowest among 15 which, according to Beach, is higher than he would be rated absolutely because some of the very lowest percentage people are actually the highest rated by Beach who expects they will be receiving promotion increases out of separate funds that year. In 1981-82, Murphy ranked fifth lowest of 18 with his 11.1% increase, but the range was only 10.0% to 13.1%, excluding D. W. Kurtz who was way ahead of the pack with his 14.6%. In 1982-83, Murphy was third lowest of 18 with his 9.6% increase, with the department spread from 9.0% to 11.7%. In his entire time with Consol, Murphy's salary went from ,800 per month to \$2,955 per month. Murphy had no idea what anyone else was receiving in the way of salary increases, nor was he ever told he was receiving a low percentage increase because his performance was unsatisfactory or sub-standard.

Paradoxically, both sides rely on the same evidence, more or less, to support their respective positions. I subscribe to Murphy's position that he was performing satisfactorily as evidenced by his progressively increasing salary over the years. Beach did not testify that Murphy was told he was only getting a certain percentage increase because of sub-par performance. I find Respondent's Exhibit No. 1 to lack any probative value on the issue of Employer's motive for termination. Before leaving this subject, I think even Beach had trouble believing the argument that Murphy's 16% increase when joining the Environmental Quality Assurance group did not represent a promotion but was merely a salary adjustment to lend prestige to the newly-formed group. I am sure Murphy was told that if he accepted the position he would receive a substantial salary increase. I am equally sure he was not told his performance was substandard but nevertheless he would receive a significant increase in pay.

b. *The Paddock Memorandum*

Beach testified he had just about made up his mind to get rid of Murphy by termination rather than by some other alternative he might have available, in the days before September 24, 1982. His decision was based on the many oral complaints he received concerning Murphy's manner and behavior, as discussed at length above; Murphy's attendance record which included (remarkably!) Murphy's promptly leaving at five o'clock

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to catch a ride home in the company sponsored van-pool vehicle which left at that hour and his occasional late arrivals when delayed on personal family business; Murphy's relatively low ranking in the salary review process; and the fact that he did not think Murphy's abrasive personality would work out well in the revised third round procedures in which the emphasis was to be shifted away from field inspections to uncover areas of non-compliance, and to closer monitoring of compliance with the terms of Consol's permits which Beach felt would require more tact in inquiring into sensitive areas. (Written reports and responses were also to be eliminated in the third round, as were the quarterly state of compliance reports. These changes in procedure were implemented after R. E. Samples left his position in the company as Chairman and Chief Executive officer sometime in September of 1982. These eliminated features were implemented in the first place at Samples's direction so Beach felt they could be eliminated now that Samples was no longer in charge. Murphy felt there was some nexus between Samples's departure and his termination.)

The "final nail in the coffin" as to whether to terminate Murphy was the Memorandum from F. W. Paddock, Jr., dated September 21 and received September 24 (Complainant's Exhibit No. 19) in which Paddock called for Murphy's replacement as a member of the Environmental Quality Assurance Program. (Because of its importance to the ultimate result arrived at in this case, Claimant's Exhibit No. 19 is reproduced as Appendix I to

this decision and order.) *This is the only written criticism of Murphy ever received by Beach* (Tr. 397).

Before proceeding further with the events surrounding Murphy's termination, a short digression on the subject of Frederick W. Paddock, Jr., might be in order. Paddock holds a bachelor's degree in mining engineering from Colorado School of mines. Upon graduation from college, he spent three years as an officer in the United States Army, Corps of Engineers, mostly serving as a Company Commander. He began his career with Consol in 1971, and has been in his present position, Regional Manager for Environmental and Engineering Affairs, Northwestern Region, since September 1979. Despite the title of the position he holds, Paddock admits he has had little personal experience working in the environmental field, relying instead on the people on his staff who have broad knowledge of the field, such as Neumann. Paddock had never even met Murphy until the hearing.

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All the knowledge he had of Murphy, including the assessments: "He does not listen well," and he "proceeds with 'tunnel vision' and deaf ears," he acquired from what other people told him. Paddock decided to write the memorandum recommending Murphy's termination after attending a meeting called by his boss, G. G. Schneider, where the subject was the Environmental Quality Assurance Program. Present at the meeting were two vice presidents from the operating areas and, although they were critical of the program, their criticisms seemed to relate to Murphy and his inspection and reporting techniques. But they, too, were relying on word-of-mouth as they had never met Murphy either. Paddock estimates that he received between one and two dozen comments about Murphy from people in the field between April 1981 and September 1982.

Having received and reflected upon the contents of Paddock's memo, Beach made the decision to terminate Murphy. Approximately 10 days before reaching this decision, Beach, on September 14, 1982, had processed the E & C⁸ giving Murphy the 9.6% increase settled on the past April. If Beach in fact had been mulling over the advisability of terminating Murphy for some time, then going through the motions needed to effect a raise in pay for an employee whose fate was just about sealed strikes me as a strange if not downright cruel personnel practice. For this reason I do not accept Beach's characterization of Paddock's memo as merely the final nail in the coffin. Beach recognizes Paddock as a "high potential man" and, from my observation and evaluation of the man at the hearing, he is not a person to be taken lightly. Paddock saw the opportunity to settle some old accounts with Murphy who, if he had not already done so, showed promise of embarrassing or possibly even endangering Paddock's advancement up the corporate career ladder by exposing and reporting environmental irregularities in the territory for which Paddock held responsibility.

Beach also had in his possession a document laudatory of Murphy which was written and received during the pivotal month of September 1982. It was a memorandum from D.

E. Rogers, the attorney from Consol's legal department who specializes in environmental matters, to Beach on the subject of the Environmental Audit Program. The memo was highly critical of the written report aspect of the program, both for the inhibiting effect it has on both inspectors and "inspectees," and for the

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fact that it memorializes matters that might be violations of law and thus raises the possibility that those violations could be proven to be willful and result in severe penalties. About the people in the program, however, Rogers had the following to say:

The people you have working in the program are, in my opinion, the very best people you could possibly find for the job. I have been very impressed with their willingness and ability to learn a great deal of very complicated environmental law and their tenacity in getting answers to difficult questions that their inspections turn up. Dave Larson and Tom Murphy are valuable to me as highly skilled paralegals - - - which can be said of practically every person you have working in your department - - - and I sometimes think I depend more on their advice and opinions than they can depend on mine. From a personnel standpoint, I think the audit program could not be in better shape.

This memorandum is dated September 9, 1982, and was stamped received in the EQC Department on September 15.

Rogers appeared at the hearing as Complainant's only other witness beside Murphy himself. Considering the fact that Rogers is still a Consol employee, yet still had the courage to come forward to testify on behalf of someone who could not be more out of favor at Consol Plaza, Rogers's testimony is entitled to and will be accorded the highest degree of credibility. Rogers gave a perfectly candid description of his professional relationship with Murphy, including his impressions of Murphy's perception of his job as that of a policeman and his singlemindedness in pursuit of reporting all violations despite the litany of criticisms such as *de minimus* item reporting, abrasiveness, difficulty in communicating with, and nitpicking. Withal, Murphy did his job well, according to Rogers, and would not have run into the same problems in dealing with operations people absent the rigid written report and response procedures.

In any event, on October 1, 1982, Beach called Murphy into his office where, in the presence of Dave Larson, he conducted a "termination interview." Murphy was told he was being terminated for unsatisfactory performance, effective November 15, 1982, under normal conditions. Murphy was told that normal conditions

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meant that he do nothing or say nothing that would embarrass the company or especially the EQC department. According to all three people who were in the room, including Murphy himself, Murphy's reaction upon hearing the news was one of shock.

Murphy was told he would remain on salary (ironically, his percentage increase went into effect on the day he was fired) and could come in to the office to use the telephone and services of the secretary to look for a new job. Murphy was advised that Beach would go along with the fiction that Murphy had resigned. Murphy did not heed Beach's advice about not doing anything to embarrass the office; rather, he went about telling people in the office that he had been terminated because he had been doing his job too well. To state his own case to his employees, Beach called a meeting of the department staff on October 15, 1982, to explain that Murphy had been fired because of his attitude, his personality, his bullheadedness and his approach to everyone as if they were criminals engaged in a conspiracy to violate the environmental laws. Also in October, Luise K. Davis was transferred within Consol to fill the vacancy left in the Environmental Quality Assurance Program caused by Murphy's leaving. Beach explained to her the goals of the program and the company's commitment to its environmental goals. He told Ms. Davis that Murphy had damaged the program and that he felt that Ms. Davis's personality better suited her for dealing with the operations people than Murphy's had.

Since his firing, certain events have taken place relative to Murphy's situation which, while knowledge thereof is not essential to resolution of the issues herein, is nevertheless helpful for appreciation of the overall situation. The first of these events was the issuance, on December 3, 1982, of an order by Judge Joseph E. McGuire, of the Office of Hearings and Appeals, United States Department of the Interior, which granted Murphy's amended application for temporary relief from respondent Consol's alleged discriminatory acts as defined and prohibited under the provisions of section 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293, pending completion of the investigation which commenced with the filing of the complaint under the Whistleblower provisions of the cited Act. Judge McGuire ordered that Murphy be rehired or reinstated with full back pay from his termination date, November 16, 1982, and included therein fringe benefits including family health benefits.

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In spite of the outstanding order by Judge McGuire, ordering Murphy's reinstatement pending final outcome of the O.S.M. proceeding, Murphy was informed by letter from Beach dated January 14, 1983, that as a result of a force reduction in the EQC Department, he was being laid off effective January 31, 1983. Beach explained in testimony that he received directions from corporate management to conduct a force ranking with a view toward eliminating two jobs. Murphy, of course, came out lowest in Beach's criteria which included education and work experience, performance, and personality, as well as management and performance and potential. The other person "laid off" was a non-professional technician who was picked up by CONOCO in some capacity. Beach explained that in Consol the expression "laid off" means dismissal from

employment and has no connotations that the person, at some time in the future, will be called back. My information at this writing (mid-July 1983) is that Judge McGuire held another hearing the day before the second hearing session in this case and as a result of evidence taken at that hearing again ordered Murphy's reinstatement with back pay and continuation of health benefits. My further information is that Murphy is in a pay status at present. Murphy's own outlook for his future if he does not prevail in any of the suits he has pending is not too bright, at least in the corporate environmental field, since the three commonly owned companies, DuPont, CONOCO and Consol, exert great influence, respectively, in the chemical, oil and coal industries where one would be most likely to seek a job in the environmental field.

5. Discussion and Conclusions

A. Jurisdiction -- An initial determination must be made whether Murphy, as one paid to report apparent violations of the major Federal environmental statutes, is in the class of persons intended to be covered by the Employee Protection provisions of the several statutes under which action is brought. The Employer in its brief frames the issue slightly differently by saying Murphy was paid to report *potential* violations. There is an obvious distinction between "potential" and "apparent." Potential implies violations not yet in being but liable to become such at some time in the future if corrective action is not taken. Of course, Murphy's job included reporting such potential violations, but his main function, as heretofore described from several angles, was to report what appeared to him, with his wide knowledge and experience with environmental laws and regulations, to be actual violations. So a threshold

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question, which must be answered in the affirmative for Murphy to come within the group of protected employees is, does reporting violations to his employer constitute a protected act since at no point in his testimony did Murphy even hint that he had filed any complaint or participated in any action before the Environmental Protection Agency or any other government agency. Quite to the contrary, in denying any such reporting Murphy quickly added that that was not his job.

Under the Clean Water Act employee protection for whistleblowing is set out as follows:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, an employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter. 38 U.S.C. § 1367.

The preamble to the Employee Protection provisions of the RCRA reads substantially identically except that following the word "chapter," the phrase, "or under any applicable implementation plan" are appended to embrace actions brought under the implementing regulations."⁹ 42 U.S.C. § 6971. Similarly, the Employee protective provisions under Superfund are limited to situations where there are "Proceedings." Inasmuch as Murphy had not filed or caused to be filed any proceeding under any of the three cited Acts, nor had he either testified or was about to testify in any proceeding, I find that Murphy was not a protected employee under the Clean Water Act, RCRA or Superfund.

The Clean Air Act, Safe Drinking Water Act and Toxic Substances Control Act contain language which may confer employee protection status on Murphy, even though what has already been said about lack of any "proceeding" is certainly also true about these three Acts. The Employee Protection provision of the Toxic Substances Control Act, 15 U.S.C. § 2622, reads as follows:

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(a) In general

No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has -

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter;

(2) testified or is about to testify in any such proceeding; or

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

The last phrase after the disjunctive would appear to give Murphy protected employee status. "Any other action" may include reporting conditions violative of the Act to one's superior because obviously such is done "to carry out the purpose of this chapter [the Act]." Even Consolidation Coal Company must concede this to be true because the opposite would place it in the untenable position of having its employee report violations of the Act to give it the opportunity to thwart or circumvent rather than carry out the purposes of the Act. Accordingly, I find that Murphy had protected employee status, for the reasons just given, with respect to the Clean Air Act, the Safe Drinking Water Act and the Toxic Substances Control Act.

Having found that Murphy enjoys protected employee status, the question now to be answered is whether his discharge was for a protected activity. Stated differently, was Murphy's discharge motivated by other than purely business consideration? Throughout its brief, the Employer maintains that Murphy was discharged *solely* as the result of serious personality and communications problems with personnel in almost every region he inspected and, it speculates, these problems would have become more pronounced in the third round of inspections because those inspections were going to require more personal contact between the inspectors and operations personnel. This sweeping statement, upon which the Employer's whole case rests, does not stand up under close

scrutiny. All of the alleged complaints, with the sole exception of the Paddock memorandum, which reached Beach were oral, and many were received from Consol employees higher up on the employment ladder than Murphy who naturally

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resented Murphy's written reports memorializing the environmental violations observed in their areas of responsibility. Time and again witnesses against Murphy who were critical of his reports, when asked for specific instances where Murphy exceeded his instructions by reporting areas or items which were not apparent violations, were unable to do so, Murphy's brief was to report *all* items of apparent violation of the environmental laws. This is what he did and, in doing so, incurred the antipathy of persons in high places, persons who could and eventually did destroy his career. Murphy's job was a difficult one, but in performing it he did not choose the easy road, the one apparently taken by Larson, of reporting only two or three of the more significant items turned up in each inspection. Murphy reported major items and what Dave Larson considered *de minimus* items without apparent regard for the consequences. Accommodation and compromise apparently come much more easily to Dave Larson than they do to Thomas Murphy.

I do not find to be credible Beach's and Larson's explanation why Murphy's reports were not changed to remove substantive material and alter the tone to make them more palatable to the recipients. I find that these reports went out the way they did because, so long as R. E. Samples held sway as Chairman and C.E.O., that's the way Beach and Larson wanted them to go out.

With respect to the specific act for which Murphy was fired, the one in which he enjoyed protected Employee status under the Toxic Substances Control Act, I rely on the inspection, in the company of Richard Denning, of the Hillsboro Mine and Preparation Plant, conducted on July 1, 1982. Serious labeling, recordkeeping, storage and disposal requirements of the PCB regulations (where false information about the very existence of PCBs at the site was given) were uncovered. For reporting this matter which occurred in an area under the jurisdiction of Frederick W. Paddock, Jr., Murphy was shortly to be given his termination notice. In reaching this conclusion, I am making credibility findings, based upon my observation of the demeanor of the witnesses, that Beach fired Murphy as a direct consequence of Paddock's memorandum, and that this memorandum did not play the mere corroborative role which Beach in his testimony assigned to it.

In the area of employee discharge cases, there is a

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substantial body of case law dealing with dual motives. Here I have made the finding that Murphy was fired for reporting PCB violations, whose existence had been falsely denied,

to his employer. Following the Supreme Court's causation test established in *Mount Healthy School District Board of Education v. Doyle*, 429 U 274 (1977), where, as here, the employee engages in protected activities (reporting PCB violations to his employer) and is subsequently terminated, the termination will nevertheless be justified if there exists proper grounds, independent of those shown by the employee, for the termination. Here, there were no such independent grounds. Mere *days* before receiving the Paddock memorandum, Beach processed the E & C to give Murphy his salary increase. Try as they might to demean this raise from a merit increase to a formula pay adjustment, the bold fact remains that one does not process pay increases for an employee when one's mind is just about made up to terminate that employee for unsatisfactory performance. The Rogers memorandum of September 9, 1982, while critical of some aspects of the program, particularly the written reports requirement, was nevertheless highly complimentary of Murphy. Where is the memorandum back to Rogers from Beach pointing out that Rogers was wrong in his assessment of Murphy as a highly skilled paralegal, willing and able to learn a great deal of environmental law, and that in fact Murphy was an unsatisfactory performer, soon to be terminated? There is none. On the evidence before me, I am unable to say that Consol would have terminated Murphy even if he had not engaged in the protected activity. I therefore find that Consol has failed to meet the burden by the preponderance of the evidence imposed upon it by the Court in *Mount Healthy*, *supra*.

B. Affirmative Relief

A violation of the Toxic Substances Control Act having been found, several forms of affirmative relief are available and may be ordered to abate the violation found. Therefore, Consolidation Coal Company is ordered:

- (1) To reinstate Complainant, Thomas F. Murphy, to his former position, together with the compensation (including back pay), terms, conditions, and privileges of the Complainant's employment.
- (2) To pay Complainant compensatory damages,

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- the amount to be determined after Complainant's counsel has submitted a statement within 30 days of issuance of this decision, addressing the issue.
- (3) To pay Complainant's costs, including an attorney's fee, but a specific explanation by Complainant of such costs is required.

If the parties, after review of their respective positions in light of the findings and conclusions reached herein, should determine that the interests of all concerned would be better served by agreement or payment of a liquidated amount to Murphy in lieu of reinstatement and in settlement of all matters in issue, a joint statement to that effect should be filed on or before September 1, 1983. Otherwise, Respondent will have 15 days after the time provided in (2) above to file its response to Complainant's statement.

GEORGE P. MORIN
Administrative Law Judge

Dated: August 2, 1983

Pittsburgh, Pennsylvania

[ENDNOTES]

¹Both parties have waived compliance with the 90-day limitation of the various Acts and § 24.6 of the Regulations (transcript pages 726 and 727).

² National Pollutant Discharge Elimination System.

³ CONOCO is a wholly-owned subsidiary of The DuPont company.

⁴ As a matter of historical interest, it was an incident involving falsified NPDES discharge monitoring, reporting and record keeping in the Southern Appalachian Operating Region of Consol, between 1974 and 1979, and similar, but on a smaller scale, falsifications in three of the other four operating regions, which gave the initial impetus to creating the Environmental Quality Assurance program.

⁵This could be someone from the Regional EQC Department or someone directly involved in the operation, such as a mine foreman or a mine superintendent.

⁶ In this assessment of the situation, Beach showed both acumen and foresight because by September 20, 1982, H. D. Dahl, as Senior Vice President, Engineering and Environmental Affairs, was Beach's boss.

⁷The list of facilities to be inspected and audited was expanded to include, in addition to active mining operations, inactive facilities where environmental permits are still in effect and where satisfying Consol's legal, environmental obligations has not been completed, and to include new facilities under construction, not yet producing coal, but with active environmental permits.

⁸E & C stands for Employment and Changes, a Consol form used to hire, fire, transfer and give raises to employees. Beach describes it as a form that causes certain things to happen in Personnel and Payroll.

⁹In his brief Complainant argues, contrary to my interpretation, that the Environmental Quality Assurance Program itself constitutes an "applicable implementation plan." Under Complainant's broad interpretation, any action intended to achieve compliance with the Act could be considered an applicable implementation plan, which I believe exceeds the scope of the statute.